HJ. HUSSIN HJ. ALI & ORS.

v.

DATUK HJ. MOHAMED YAACOB & ORS. & OTHER CASES

HIGH COURT MALAYA, KOTA BHARU
EUSOFF CHIN J
[CIVIL SUIT NOS. 137/81, 2/82 & 4/82]
28 FEBRUARY 1983

LABOUR LAW: *Action for wrongful dismissal.*

CIVIL PROCEDURE: *Statements of claim - Application to strike out - No reasonable cause of action - Action time-barred - Whether dismissal in pursuance or execution of public duty.*

The plaintiffs claimed that the 1st defendant the Menteri Besar of the State of Kelantan, had caused the 2nd defendant to unlawfully dismiss them and that the 2nd defendant had refused to employ them from the date of dismissal. The defendants entered conditional appearance and then applied under O. 18 r. 19 Rules of High Court 1980, for the statements of claim to be struck out on the ground that they disclosed no reasonable cause of action, that they were frivolous, vexatious and were an abuse of the process of the Court. They also alleged that the actions were time-barred under s. 2(a) of the Public Authorities Protection Act 1948.

Held:

[1] The summons in chambers taken out by the defendants under O. 18 r. 19, was quite proper in the case. The procedure of "striking out" can be used to decide preliminary issues. The power to strike out is a summary power which should be exercised only in plain and obvious cases. (*Nagle v. Feilden & Ors.* [1966] 2 QB 633; *Drummond-Jackson v. British Medical Association & Ors.* [1970] 1 All ER 1094)

[2] The 1st and 2nd defendants, in dismissing the plaintiffs as Penghulus, did so in the pursuance or execution or intended execution of their public duty or authority and were entitled to raise the issue of limitation in their applications. (*Riches v. Director of Public Prosecutions* [1973] 2 All ER 935, 939)

[3] It was clear that the actions had been filed after the 3 year limitation period and were time-barred under s. 2(a) of the Public Authorities Protection Act 1948 (Act 198).

[Defendant's applications allowed. Actions dismissed.]

Cases referred to:
Nagle v. Feilden & Ors. [1966] 2 QB 633
Drummond-Jackson v. British Medical Association & Ors. [1970] 1 All ER 1094
Riches v. Director of Public Prosecutions [1973] 2 All ER 935

Legislation referred to:
Public Authorities Protection Act 1948, s. 2(a)
Rules of the High Court 1980, O. 18 r. 19

For the plaintiffs - Wan Mustapha bin Haji Ali
For the defendants - Abdul Hamid bin Hj. Mohamed

JUDGMENT

Eusoff Chin J:

The 157 plaintiffs in these three civil suits No. 137/1981, No. 2/1982 and No. 4/1982 were Penghulus Kampong, and the 3 defendants in each of these suits are Dato' Haji Mohamed Yaacob (1st defendant), the State Secretary (2nd defendant), and the Government of the State of Kelantan (3rd defendant).

The statement of claim in each of these Civil Suits, (Paragraph 9 in Civil Suit No. 137/81, para. 22 in Civil Suit No. 2/1982, and para. 42 in Civil Suit No. 4/82) claim that the 1st defendant as "the Head of State of the newly formed State Government" caused the 2nd defendant to unlawfully dismiss the plaintiffs without cause whatsoever, and that the 2nd defendant by letters dated 2 May 1978, dismissed the plaintiffs as Penghulus and had refused to employ them from that day. The plaintiffs claim reinstatement and alternatively damages.

The learned State Legal Adviser, Kelantan entered conditional appearance for the three defendants in each of these suits, and then filed in respect of each of these suits a summons in chambers under O. 18 r. 19 of the High Court Rules 1980 for each statement of claim to be struck out on the ground that it disclosed no reasonable cause of action and that it is frivolous, vexatious, irregular, null and void and an abuse of the process of Court. The affidavit in support of this application filed by the State Legal Adviser also alleges that the action is time barred under s. 2(a) of the Public Authorities Protection Act 1948.

Both parties agree that the three applications be taken together. On 2 December, 1982, I heard the applications in Chambers and adjourned to open Court for further arguments on 11 January 1983.

The State Legal Adviser, Encik Abdul Hamid bin Hj. Mohamed, submitted that the actions have been filed out of time. He argued that the notices of termination of the services of all the plaintiffs as Penghulus Kampong were sent out by 2nd defendant on 2 May 1978. The plaintiffs filed:

i) Civil Suit No. 137/1981 on 24 January 1981, i.e. 3 years 7 months later.

ii) Civil Suit No. 2/1982 was filed on 2 January 1982, i.e. 3 years 8 months later, and

iii) Civil Suit No. 4/1982 was filed on 6 January 1982, i.e. 3 years 8 months later.

He submitted that the actions of the 1st defendant and 2nd defendant in terminating the services of the plaintiffs as Penghulus Kampong were done in the execution of their public duties, especially the action of the 2nd defendant, the State Secretary, who was subject to the order of the 1st defendant who was the Menteri Besar of the State. He submitted that the actions were time barred under s. 2(a) of the Public Authorities Protection Act 1948 (Act 198).

The learned Counsel for the plaintiffs, Dato' Wan Mustapha submitted that all the plaintiffs had a good cause of action since they were dismissed without being given proper notices of termination, and the only notice which each of plaintiffs received was notice of termination of his service as Penghulu Kampong. He submitted that the defendants should not be allowed to make this application to strike out the statements of claims of the plaintiffs since the defendants had not filed their defence. He further submitted that the action of the 2nd defendant (the State Secretary) in dismissing the plaintiffs from their services as Penghulus Kampong was not an action in the execution of his public duty.

I allowed the application of the learned State Legal Adviser to strike out the plaintiffs' statements of claims in all the three Civil Suits and dismissed the actions with costs.

In *Nagle v. Feilden & Ors.*, [1966] 2 QB 633, at p. 648, para. 2, Danckwerts LJ when dealing with an appeal against the order of Master Clayton and John Stephenson, J who had upheld Master Clayton's order that the plaintiff's' statement of claim be struck out and the action dismissed, said:

> The summary remedy which has been applied to this action is one which is only to be applied in plain and obvious cases when the action is one which cannot succeed or is in some way an abuse of the process of the Court.

In *Drummond-Jackson v. British Medical Association and Ors.* [1970] 1 All ER, 1094, the first defendant had applied to strike out the statement of claim of the plaintiff under O. 18 r. 19(1)(a) as disclosing no reasonable cause of action, but the Master and on appeal, the Judge in chambers, refused the application. Lord Denning MR, at p. 1098, para. 2 said:

> The first question is whether this procedure - an application to strike out - is an appropriate procedure. I think that it is.

and at p. 1099, para. 2, he said:

> The procedure of 'striking out' is ready to hand. We have used it many times lately to decide preliminary issues.

Lord Pearson in the same case, said at p. 1101-

> Over a long period of years it has been firmly established by many authorities that the power to strike out a statement of claim as disclosing no reasonable cause of action is a summary power which should be exercised only in plain and obvious cases. The authorities are collected in The Supreme Court Practice 1970 under the heading `Exercise of Powers under this Rule' in the notes under O. 18, r 19. One which might be added is *Nagle v. Feilden*. Reference has been made to four recent cases: *Rondel v. Worsley, Wiseman v. Borneman, Roy v. Prior and Schmidt v. Secretary of State for Home Affairs.* In each of these cases there was an important question of principle involved, and the hearing of the application under RSC O. 18, r. 19, was much longer and more elaborate than is usual, but the final decision was that the alleged cause of action was clearly unsustainable, and so the statement of claim disclosed no reasonable cause of action and was ordered to be struck out. There was no departure from the principle that the order for striking out should only be made if it becomes plain and obvious that the claim or defence cannot succeed but the procedural method was unusual in that there was a relatively long and elaborate instead of a short and summary hearing. It must be within the discretion of the Courts to adopt this unusual procedural method in special cases it is seen to be advantageous. But I do not think that there has been or should be any general change in the practice with regard to applications under the rule.
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> In my opinion the traditional and hitherto accepted view - that the power should only be used in plain and obvious cases - is correct according to evident intention of the rule of several reasons. First, there is in r. 19(1)(a) the expression 'reasonable cause of action,' to which Sir Nathaniel Lindley MR called attention in *Hubbuck & Sons Ltd. v. Wilkinson, Heywood and Clark Ltd.* No exact paraphrase can be given, but I think 'reasonable cause of action' means a cause of action with some chance of success, when (as required by r. 19(2)) only allegations in the pleading are considered. If when those allegations are examined it is found that the alleged cause of action is certain to fail, the statement of claim should be struck out. In *Nagle v. Feilden* Danckwerts LJ said:
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> > The summary remedy which has been applied to this action is one which is only to be applied in plain and obvious cases, when the action is one which cannot succeed or is in some way an abuse of the process of the Court.

I therefore decided that the summons in chambers taken out by the learned State Legal Adviser under O. 18 r. 19 RHC 1980 was quite proper in this case.

The next issue is whether the three suits filed by the plaintiffs are time barred under s. 2(a) of the Public Authorities Protection Act 1948 (Act 198) which states:

> 2. Where, after the coming into force of this Act, any suit, action, prosecution or other proceeding is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provisions shall have effect-
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> (a) the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within thirty-six months next after the act, neglect or default complained of or, in the case of a continuance of injury or damage within thirty-six months next after the ceasing thereof,

The learned Counsel for the plaintiffs alleged that the 1st defendant when instructing the 2nd defendant to terminate when carrying out that instruction, did so not in execution of any public duty, whereas the learned State Legal Adviser had submitted that they did.

To determine this issue it is necessary to examine the statements of claims by the plaintiffs and the affidavit of the learned State Legal Adviser dated 23 January 1982 filed with the summons in chambers, and the affidavit in reply dated 1 December 1982 filed by the learned Counsel for the plaintiffs. As I have stated earlier, the plaintiffs in their statements of claims had alleged that the 1st defendant had in April 1978, in his capacity as Head of State of the newly formed State Government caused the 2nd defendant to unlawfully dismiss the plaintiffs forthwith, and that the 2nd defendant the State Secretary, as agent or servant of the 3rd defendant (the State Government) had by letters dated 2 May 1978, dismissed the plaintiffs or determined their services as Penghulus. On this issue, paras. 6 and 7 of the affidavit of the learned State Legal Adviser dated 23 January 1982 state:

> 6. The regulations governing the appointment of Penghulus Kampong at the material time were provided under Skim Perkhidmatan Penghulu-Penghulu Kampong Kelantan which was issued under the cover of Pekeliling Perkhidmatan Bil. 3 tahun 1968 dated 1 May 1968 a copy of which is annexed herewith and marked as Exhibit 'WM I'.
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> 7. I aver that the defendants' action in relieving the plaintiffs of their appointments as Penghulus Kampong on the 2 May 1978 were acts done in the execution of a public duty and in accordance with the authority provided by the relevant regulations and in the circumstances by virtue of s. 2(a) of the Public Authorities Protection Act 1948, the plaintiffs' action against the defendants is statute barred.

Paragraph 6 of the Skim Perkhidmatan Penghulu-Penghulu Kampong Kelantan states:

> 6. Calun yang berjaya akan dilantik oleh Menteri Besar dan ia akan diberi satu surat kuasa mengikut contoh di Hujungan A.

The affidavit in reply dated 1 December 1982 of the learned Counsel for the plaintiffs does not touch specifically on this issue. I examine these affidavits purely to determine whether or not the 1st and 2nd defendants in determining the services of, or dismissing the plaintiffs as Penghulus did so "in pursuance or execution or intended execution ... of any public duty or authority." Whether what the 1st and 2nd defendants did was right or wrong is not an issue for me to determine in this application. I am of the view that the 1st and 2nd defendants did so in pursuance or execution or intended execution of their public duty or authority, and therefore the learned State Legal Adviser is entitled to raise this limitation in this application.

Russell LJ in *Riches v. Director of Public Prosecutions*, [1973] 2 All ER 935, at p. 939, at para. 5, said:

> In the light of those more recent authorities, I think, as I say, that perhaps the observations of this Court in *Dismore v. Milton* went too far. I do not want to state definitely that, in a case where it is merely alleged that the statement of claim discloses no cause of action, the limitation objection should or could prevail. In principle, I cannot see why not. If there is any room for an escape from the statute, well and good; it can be shown. But in absence of that, it is difficult to see why a defendant should be called on to pay large sums of money and a plaintiff be permitted to waste large sums of his own or somebody else's money in an attempt to pursue a cause of action which has already been barred by the statute of limitations and must fail.

In the instant three actions, it is clear that the actions had been filed after the 3 year limitation period. I therefore allowed the applications of the defendants, and dismissed the actions with costs.

Also found at [1983] 2 CLJ 214